In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1514

JOHN J. CONSIDINE, JR.,
ARTHUR PLOTKIN,
HARVEY T. PLOTKIN,
RUTH LYNCH,
STEVEN J. EMERSON,
BONNIE R. GLIXMAN,
JOSEPH GLIXMAN,
JOHN MOCCIA,
JULIUS SILVERMAN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on March 4, 1977.

The petitioners file herewith a single petition in accordance with Rule 23(5), their appeals in the lower court having been heard on a consolidated record appendix.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is annexed hereto as an Appendix, commencing at page 7.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on December 10, 1975.

The judgments of the Court of Appeals for the First Circuit were entered on March 4, 1977, and is annexed hereto as an Appendix, commencing at page 20.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1) and Rule 22(2).

The judgment sought to be reviewed is dated, and was entered March 4, 1977. An order extending time to file petition for Writ of Certiorari was entered by this court on April 4, 1977.

Questions Presented

1. Whether evidence derived from an illegal wiretap may be used against persons not intercepted by that illegal wiretap.

2. Whether standing to suppress evidence under 18 U.S.C. §2515 and 18 U.S.C. §2518 is broader than standing under the Fourth Amendment of the United States Constitution.

Statutes Involved

18 §2510 *Definitions*

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 §2515 *Prohibition of use as evidence of intercepted wire or oral communications*

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 §2518 *Procedure for interception of wire or oral communications*

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory bory, or other authority of the United States, a state, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

Statement of the Case

A. *The Proceedings Below*

This petition for writ of ceritorari is from a decision of the United States Court of Appeals for the First Circuit affirming the judgments of conviction of the United States District Court for Massachusetts. On September 12, 1972 the petitioners were indicted for operating an illegal gambling business in violation of 18 U.S.C. §1955. The petitioners plead not guilty and each timely filed a motion to suppress and for the return of property. The motions, in part, challenged the legality of evidence obtained through illegal wiretaps and electronic surveillance. On November 5, 1975, defendants all were convicted after a jury trial. Their convictions have been affirmed by the Court of Appeals for the First Circuit on March 4, 1977.

B. *Statement of Facts*

In 1970 over one hundred conversations of a co-defendant, Domenic Serino,[1] had been intercepted by a wiretap (here-

[1] Whose conviction has been reversed by the First Circuit Court of Appeals, and who is not a party to this Petition.

in after referred to as "Mother Tap") which had been ruled illegal and ordered suppressed.

Transcripts of some of Serino's intercepted conversations and a synopsis of an F.B.I. interview of Serino which was conducted immediately after the Mother Tap had been terminated were included in an affidavit supporting an application for a second wiretap order. Also included in that affidavit were reports to the affiant from several F.B.I. agents and undisclosed informants.

This second wiretap (hereinafter referred to as "Offspring Tap") was part of a series of eight wiretaps conducted during an investigation of illegal gambling in the Boston area and southern New Hampshire. The petitioners and their co-defendant, Serino, were intercepted by the Offspring Tap. The government has repeatedly conceded that without evidence derived from this Offspring Tap the government would have no case against your petitioners.

The petitioners and Serino moved to suppress the Offspring Tap in part based upon their contention that it was derived from the illegal Mother Tap, which previously had been suppressed. The court ruled that only Serino had standing to benefit from the suppression of the Mother Tap and that, in effect, the tainted evidence contained in the affidavit which supported the order to conduct Offspring Tap could be used against the petitioners. Serino's conviction was reversed by the Court of Appeals and remanded for further proceedings because the trial court erred in not allowing Serino discovery of transcripts of his conversations illegally intercepted by the Mother Tap before the hearing on his motion to suppress.

The Court of Appeals adhered to the trial court's ruling on standing and the petitioners' convictions were affirmed.

Reasons for Granting the Writ

WHETHER EVIDENCE DERIVED FROM AN ILLEGAL WIRETAP MAY BE USED AGAINST PERSONS NOT INTERCEPTED BY THAT ILLEGAL WIRETAP. IN EFFECT, IS STANDING TO SUPPRESS EVIDENCE UNDER 18 USC §2515 AND 18 USC §2518 BROADER THAN STANDING UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioners' conversations were intercepted by a wiretap which was the offspring of an earlier wiretap (Mother-Tap) which had been declared illegal and suppressed. Conversations intercepted by the Mother-Tap and other evidence derived from that tap were included in the affidavit which supported the application for authorization to conduct the later Offspring-Tap which had intercepted the petitioners' conversations. The petitioners moved to suppress the Offspring wiretap which had intercepted them based, in part, upon the use in violation of 18 USC §2515 of illegally obtained wiretap evidence in the application for authorization of the Offspring-Tap. They contended that though they were not "aggrieved persons" within the meaning of 18 USC §2510(11) and could not move to suppress the earlier Mother-Tap under 18 USC §2518(10) (a); they were protected from the use of illegal wiretap evidence by the exclusionary provisions of 18 USC §2515.

The trial court applied the court-made exclusionary rule and held that since none of the petitioners were intercepted by the Mother-Tap none had standing under the *Fourth Amendment*. The trial court applied the court-made exclusionary rule as defined in *Alderman* v. *United States*, 394 U.S. 165 (1969) and not the exclusionary rule created by Congress in 18 USC §2515 for evidence obtained by illegal

wiretap. The petitioners contend that the statutory exclusionary rule precludes the admissibility of evidence obtained in violation of the wiretap statute against anyone — even those not intercepted by an illegal wiretap. As applied in cases of constitutional violations, however, the court-made exclusionary rule would not apply to persons like the petitioners and evidence obtained from the illegal Mother-Tap could be used against them.

Since this court's decision in *United States* v. *Calandra*, 414 U.S 351 (1974) it has been recognized that the exclusionary provision of 18 USC §2515 pertaining to wiretaps and electronic surveillance is broader than the court-made exclusionary rule in the case of Fourth Amendment violations. In *Calandra* this court noted that though Congress had permitted the suppression, in a Grand Jury proceeding, of evidence obtained through illegal wiretapping; suppression of evidence seized in violation of the Fourth Amendment was not suppressible in the Grand Jury. (See *United States* v. *Gelbard*, 408 U.S. 41 (1972)). The contrast between *Calandra* and *Gelbard* itself is significant because it indicates that Congress has expanded the applicability of the exclusionary rule in wiretap cases.

Since the enactment of 18 USC §2515 in 1968, no case except your petitioners' appears to have considered directly, the breadth of the exclusionary rule under the statute as opposed to the court-made exclusionary rule under the Fourth Amendment. Numerous cases have been decided throughout the United States Circuit Courts of Appeals but each case has considered the rule as defined in *Alderman* v. *United States*, 394 U.S. 165 (1969), which had been decided solely upon the court-made rule as applied to constitutional violations. No case has considered whether the statutory exclusionary rule is broader.

The distinction between the statute and court-made exclusionary rule is manifested by the fact that although only an "aggrieved person" as defined in 18 USC §2510 (11) may *move* to suppress evidence under 18 USC §2518 (10) (a) which was obtained by illegal wiretap, the exclusionary provision of 18 USC §2515 bears no such limitation. Title 18 USC §2515 precludes the receipt of evidence ". . . in any trial, hearing . . . if the disclosure of that information would be in violation of this chapter." 18 USC §2515. Title 18 USC §2518(10) (a) by its own language is limited to only persons intercepted or the target of a wiretap but no such limitation is embodied in the language of 18 USC §2515. Title 18 USC §2515 precludes the use of evidence which had been suppressed without restricting its inadmissibility against only those who are aggrieved persons.

The court-made exclusionary rule is limited to only those who are aggrieved persons but such a limited application of the statute's exclusionary rule would defeat the intent of the rule to deter illegal wiretapping. The instant case manifests the ineffectualness of an exclusionary rule limited to only aggrieved persons as the proliferation of wiretapping and electronic surveillance reaches succeeding generations of wiretaps. Evidence derived from illegal mother taps may be used against hundreds, perhaps thousands, of individuals through subsequent wiretaps.

If the exclusionary rule is intended to deter illegal acts, certainly, the need for a broader application of the exclusionary rule in wiretap cases is manifested by this case which concerns the offspring wiretap of an illegal mother tap. In this case, of the ten (10) defendants, under the court-made rule the evidence could be admitted against nine (9) (your petitioners) and excluded as to only one.[2]

[2] Co-defendant Dominic Serino was intercepted by the Mother-Tap and his conviction was reversed.

Any deterrent effect of the court-made rule would be lost since illegally obtained evidence from the Mother-Tap might be admissable as here, against ninety percent (90%) of the defendants. The court-made rule's application in cases of illegally obtained confessions or illegally seized evidence generally would have greater deterrance since smaller groups of defendants might be involved and the impact of suppression therefore, greater, but in the case of the wiretaps the deterrent effect of the court-made rule is attenuated by the numbers of people involved.

This petition presents the second generation of wiretaps and manifests the ineffectualness of suppression as a means of deterrence so long as suppression is restricted to those classes protected by the court-made rule. If the illegal first generation can be used with little reservation in succeeding generations of wiretaps then there will be no incentive to adhere to the strict regulations in conducting wiretap and electronic surveillance which Congress mandated in 18 USC §2510 et. seq.

The petition offers this Court an opportunity to consider the contrast between the statute's exclusionary rule and the court-made exclusionary rule although no other circuit has considered such a conflict yet. Without such an analysis it is doubtful that any lower court would venture such an expansionary interpretation of an exclusionary rule even though the language of the statute and Congress' intent to deter illegal wiretaps support such an interpretation.

Conclusion

It is expected that there will be an increase in number of opinions and decisions arising among the courts in similar cases as the progeny of the first generation of wiretaps proliferate the judicial systems. A Writ of Certiorari will be necessary to resolve these questions as soon as possible.

Respectfully submitted:

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Attorneys for the Petitioners

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1012

UNITED STATES OF AMERICA,
APPELLEE,
v.
ARTHUR PLOTKIN,
DEFENDANT, APPELLANT.

No. 76-1013

UNITED STATES OF AMERICA,
APPELLEE,
v.
DOMINIC SERINO,
DEFENDANT, APPELLANT.

No. 76-1014

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOHN CONSIDINE, ET AL.,
DEFENDANT, APPELLANT.

No. 76-1015

UNITED STATES OF AMERICA,
APPELLEE,
v.
JULIUS SILVERMAN,
DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, U.S. District Judge]

Before CLARK,* *Associate Justice,*
U.S. Supreme Court (Ret.),
McENTEE, and CAMPBELL, *Circuit Judges.*

Henry D. Katz, with whom *Francis J. DiMento, Max C. Goldberg, Goldberg & Hass, Paul Redmond*, and *S. James Alberino* were on brief, for appellants.

Frederick Eisenbud, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Joseph S. Davies*, Attorney, Department of Justice, and *Stephen Jigger*, Special Attorney, Department of Justice, were on brief, for appellee.

March 4, 1977

McENTEE, *Circuit Judge.* After a jury trial, appellants were convicted of operating an illegal gambling business in violation of 18 U.S.C. § 1955. This appeal turns on the legality of a wiretap instituted under the Omnibus Crime Control and Safe Streets Act of 1968, *viz.* 18 U.S.C. § 2518.

Appellants assert that the affidavit supporting the issuance of the wiretap order in this case was fatally tainted by a prior (admittedly illegal) wiretap; that the wiretap instituted pursuant to the order was therefore illegal; and that the evidence ultimately seized as a direct result of the wiretap was consequently the "fruit of the poisonous tree." Appellants argue that the trial judge therefore erred in refusing to suppress any of the evidence resulting from the wiretap.

At the outset we note that all of the appellants are challenging the admission of the evidence on the ground that it is the fruit of an illegal wiretap which intercepted conversations of appellant Serino. None of the other appellants were allegedly overheard during any other illegal wiretap. Only appellant Serino therefore has standing to assert a violation of his Fourth Amendment rights in seek-

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* Sitting by designation.

ing to suppress the evidence. *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Alderman* v. *United States*, 394 U.S. 165, 174-76 (1969); *Jones* v. *United States*, 362 U.S. 257, 261 (1960); *United States* v. *Scasino*, 513 F. 2d 47, 51 (5th Cir. 1975). Appellants also seek to assert on appeal the government's alleged failure to comply with the wiretapping safeguards of the 1968 Act, *see* 18 U.S.C. § 2518(1)(e), as a basis for suppressing the fruits of the wiretap. We need not decide, however, whether the government did violate the 1968 Act or whether all appellants have standing to raise this issue. It was not raised below, *see* 18 U.S.C. § 2518(10)(a), and was therefore waived. Fed. R. Crim. P. 12 (b) (2). Since the appellants other than Serino pose no issues cognizable on appeal we affirm their convictions and proceed to consider the merits of appellant Serino's challenge to the trial judge's refusal to suppress the evidence.[1]

---

[1] Appellants also assert that if appellant Serino is successful in his challenge to the sufficiency of the affidavit supporting the wiretap order in this case, the affidavit will name only four instead of five participants in the illegal gambling operation described in the affidavit. According to this argument, a business with only four participants would not meet the jurisdictional standards of 18 U.S.C. § 1955(b) (1) (ii). The wireap order, therefore, would have no jurisdictional basis and could be challenged by appellants. This argument fails primarily because appellants do not have standing to raise a violation of Serino's Fourth Amendment rights and may not assert that the affidavit improperly included him as an alleged participant in the gambling operation. Furthermore, the affidavit claimed that other, unnamed persons were engaged in accepting "laid-off" bets from the operation in question. (Laid-off bets are long odds and other wagers which a bookmaker places with another bookmaker to distribute his risks. See *United States* v. *DiMuro*, 540 F.2d 503, 507 n. 4 (1st Cir. 1976), *cert. denied*, ___ U.S. ___ (1977).) The persons accepting "laid-off" bets are persons involved in a single "illegal gambling business" within the meaning of 18 U.S.C. § 1955. *United States* v. *DiMuro*, *supra*, 540 F.2d at 508. Hence the operation described in the affidavit had five or more participants even if appellant Serino is not included in their number.

The affidavit supporting the wiretap in this case was filed by FBI Special Agent Lucksted. In one portion of his affidavit, Agent Lucksted quoted extensively from a recorded telephone conversation which the FBI had intercepted during what is now conceded to have been an illegal wiretap operation. In that conversation, a person at the tapped phone telephoned one of the numbers for which the wiretap was to be sought in this case. There followed an extended conversation which unmistakably showed that both telephones were being used in furtherance of illegal bookmaking. After the wiretap order in the present case was issued, it was disclosed that appellant Serino was the recipient of the call overheard during this interception, and that the FBI had overheard over one hundred of his conversations during the time of the illegal wiretap.

If the wiretap order in the present case had been issued solely on the basis of the illegally intercepted conversation quoted in the Lucksted affidavit, we have no doubt that the wiretap which it supported and the evidentiary fruits thereof could play no part in the conviction of Serino. However, Agent Lucksted's affidavit did not rest solely on this illegally overheard conversation. Lucksted stated in another portion of the affidavit that a conditional informant, known to him over a long period of time to be reliable, had provided him with certain information. The informant reportedly had told Lucksted that he was in the gambling business and that he had placed bets on a large number of occasions by telephoning the numbers sought to be wiretapped. The informant also allegedly stated that, through conversations with four named individuals, including appellant Serino, he had learned that they were part of a single gambling enterprise. The informant also reported that this enterprise "laid off" bets to other bookmakers in Massachusetts.[2] This informant's statements

[2] *See* note 1, *supra*.

alleged the existence of a gambling operation of sufficient size to violate 18 U.S.C. § 1955. Since the informant was shown to have been reliable on previous occasions and since the information was sufficiently detailed to provide a substantial basis for weighing its credibility, Lucksted's statements in this portion of the affidavit, standing alone, would justify a finding of probable cause for the issuance of an intercept order. *United States* v. *DiMuro*, 540 F. 2d 503, 519 (1st Cir. 1976), *cert. denied*, — U.S. — (1977). And if this information was untainted by the prior, illegal wiretap, this portion of Lucksted's affidavit would justify the wiretap order despite the inclusion of tainted information in the same affidavit:

> "The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause." *United States* v. *DiMuro, supra, quoting United States* v. *Giordano*, 416 U.S. 505, 555 (1974) (Powell, J., concurring in part and dissenting in part).

In separate portions of his affidavit, Lucksted also included allegations based on the statements of two other confidential informants. While both informants were allegedly personally known to Lucksted to have provided substantial amounts of reliable information in the past, he had not directly received their information in this case. Rather, both informants had spoken with other agents who relayed their information to Lucksted. One informant had told an agent that he was in the gambling business, had placed numerous bets by phoning the numbers sought to be wiretapped, and that while placing bets he had spoken with someone claiming to be appellant Serino at other telephone

numbers. This informant identified only three named participants in the alleged gambling business.

The other informant, also assertedly involved in illegal gambling, had stated that he had placed numerous bets by phoning the numbers sought to be wiretapped and that he had been informed by several alleged bookmakers that they were part of the same operation. This informant identified three named, alleged participants in the illegal bookmaking business, only one of whom had not been identified by the previous informer. Both informers, together, therefore, identified four participants in the alleged gambling enterprise. When read together with the evidence provided by the first informant, these informants' statements are cumulative in showing a violation of § 1955.[3]

Appellant Serino claims in this appeal that the informants' allegations are insufficient to establish probable cause for the wiretap order because the government did not carry its burden below of showing that the informants information was derived independently of the illegal wiretap which

[3] Also cumulative is an assertion contained in the paragraph of the Lucksted affidavit which quotes extensively from the illegal wiretap of appellant Serino. After setting forth the wiretap transcript and stating that the address at which Serino had been speaking from when intercepted was 63 Lancaster Avenue, Revere, Lucksted stated that agents "entered the basement apartment at 63 Lancaster Avenue . . . where they interviewed DOMINIC SERINO. At the time these Agents entered, they observed DOMINIC SERINO seated at a desk containing two telephones, marked Armstrong's, betting slips and other evidence of gambling."

The very location of this assertion in the affidavit creates, we think, a presumption that the Serino interview referred to was the fruit of the illegal wiretap. If the observations of the agents at the interview are to contribute to the sufficiency of the affidavit, then the burden is on the government to show on remand that the interview was initiated independently of any information obtained from the illegal wiretap. *See Alderman* v. *United States*, 308 U.S. 338, 341 (1939). Whether tainted or not, the interview observations are of such marginal significance to the sufficiency of the affidavit that we doubt that the resolution of this question will have any effect on appellant's motion to suppress.

tainted other portions of the affidavit. In making this argument, appellant relies on the following language from *Nardone* v. *United States*, 308 U.S. 338 (1939):

> "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established — as was plainly done here — the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." 308 U.S. at 341.

Appellant's argument is that he has indisputably shown that "wire-tapping was unlawfully employed." And, since the Lucksted affidavit rested in part on the fruits of illegal wiretapping, appellant maintains that he has proved that "a substantial portion of the case against him was a fruit of the poisonous tree." Under *Nardone*, he argues, the burden then shifts to the government to show "that its proof had an independent origin," a burden assertedly not met here.

We agree that the language from *Nardone*, quoted *supra*, is somewhat ambiguous and might be read to mean that a showing that wiretap evidence, relied on in an affidavit, was illegally obtained would create a presumption that all other evidence relied on was thus tainted. However, our understanding of *Nardone's* applicability to these facts is somewhat different. Before the burden shifted to the government, we think that appellant had to make a preliminary showing that the illegal wiretapping, otherwise to be ignored under *United States* v. *DiMuro*, *supra*, at 515, had infected the informants' reports. In *Nardone* wiretap evidence had similarly been excluded and the question to be resolved was whether the other evidence in the case had

been derived from the poisonous tree. The Supreme Court ruled that evidence stemming from the wiretap could be excluded but that the burden was preliminarily on the defendant to show taint. 308 U.S. at 341. By analogy, the burden in this case is on appellant to show some taint infecting the informants' reports before the burden shifts to the government to prove that the information was independently developed. Appellant has not made such a preliminary showing. The illegal wiretapping, as it affects this case, was not so pervasive as to suggest that all of the government's informants and leads likely flowed from the interceptions. *Compare United States* v. *Magaddino*, 496 F. 2d 455, 460-61 (2d Cir. 1974). Nor was Serino or any other appellant during the hearing on the motion to suppress able to undermine the assertions of Lucksted and other FBI agents that their informants were independently developed.

Appellant next argues that if the burden was on him to show a causal relationship betweent he wiretap and the informants' reports, the district judge erred in refusing to order the FBI to produce the transcripts of the over one hundred telephone calls involving appellant Serino which had been illegally intercepted. Appellant sought the transcripts as a possible source of evidence that the informants' reports were the fruit of the illegal wiretap.

In *Alderman* v. *United States, supra*, the Supreme Court was faced with the issue of whether the government should be compelled to disclose wiretap transcripts to a defendant who sought to meet his *Nardone* burden of showing that the evidence upon which the United States relied had been tainted by the illegal interceptions. The Court ruled:

> "With this task ahead of them, and if the hearings [on suppression of evidence] are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over

> to them the records of those overheard conversations which the government was not entitled to use in building its case against them." 394 U.S. at 183.

Alderman controls this case, we think, and we conclude that the district judge therefore erred in denying Serino's request for production of the wiretap transcripts of his conversations. The case must therefore be remanded to the district court for a fresh determination of whether the illegal wiretaps so infected the other evidence set forth in the Lucksted affidavit that no independent basis for finding probable cause existed.[4] *See Alderman, supra,* at 184-87.

The judgments in Nos. 76-1012, 76-1014 and 76-1015 are affirmed. The judgment in No. 76-1013 is vacated and remanded for proceedings consistent with this opinion.

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[4] Appellant also raised one issue which we find unnecessary to decide at this juncture. Serino asserts that the district judge erred in refusing to require the government to produce an FBI agent who informed Lucksted of one of the informant's assertions that he had phoned the numbers sought to be wiretapped on numerous occasions and had placed bets. This same informant also allegedly called Serino on different numbers to place bets and was informed by the person identifying himself as Serino that he was involved with two other defendants in the illegal gambling business. The government refused to supply the agent allegedly because to reveal his identity would automatically reveal the identity of the informant.

The quantum of evidence supplied by this informant was substantially less than that provided by the other two informants and relied upon by Lucksted. It is likely therefore that the affidavit will stand or fall on remand irrespective of how this issue is decided. In this respect, if the evidence supplied by the informant who reported directly to Lucksted is found untainted, sufficient evidence will exist independent of the wiretap for the affidavit to have shown probable cause. On the other hand the evidence supplied by the undisclosed agent and his informant will not alone support a finding of probable cause.

We think it desirable also to leave this question in the first instance to the discretion of the district judge who will deal with it anew in what may be radically altered factual setting. For example, if appellant is able to develop a plausible showing of taint after disclosure of the transcripts, it may be desirable to require more extensive exploration of the informants' independence. On the other hand, if disclosure leads to no new evidence of taint, compelling disclosure of the agent's identity might clearly be irrelevant to the outcome of the motion to suppress.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 76-1012.

UNITED STATES OF AMERICA,

APPELLEE,

v.

ARTHUR PLOTKIN,

DEFENDANT, APPELLANT.

JUDGMENT

Entered March 4, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc. Messrs. Katz and Eisenbud.]

United States Court of Appeals
For the First Circuit

No. 76-1014.

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN CONSIDINE ET AL.,

DEFENDANTS, APPELLANTS.

JUDGMENT

Entered March 4, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc. Messrs. Katz and Eisenbud.]

United States Court of Appeals
For the First Circuit

No. 76-1015.

UNITED STATES OF AMERICA,

APPELLEE,

v.

JULIUS SILVERMAN,

DEFENDANT, APPELLANT.

JUDGMENT

Entered March 4, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) Dana H. Gallup, *Clerk.*

[cc. Messrs. Katz and Eisenbud.]

No. 76-1514

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN J. CONSIDINE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1514

JOHN J. CONSIDINE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 550 F. 2d 693.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 4, 1977. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 3, 1977, and the petition was filed on May 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person who is neither the target of, nor is overheard during a period of court-ordered telephone surveillance, has standing under 18 U.S.C. 2515 and 2518

to move for suppression of the intercepted communications.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. They were sentenced as follows: Harvey Plotkin—a two-year suspended sentence, three years' probation, and a $5,000 fine; Lynch—a two-year suspended sentence, three years' probation and a $2,500 fine; Emerson, Bonnie Glixman, and Joseph Glixman—a one-year suspended sentence, two years' probation, and a $1,000 fine; Moccia, Silverman, and Considine—a one-year suspended sentence, three years' probation, and a $1,000 fine; Arthur Plotkin—a one-year suspended sentence, three years' probation, and a $5,000 fine. The court of appeals affirmed (Pet. App. A).

On June 1, 1971, a Department of Justice attorney applied for an order authorizing the interception of wire communications at a residence located at 63 Bickford Avenue in Revere, Massachusetts, averring that there was probable cause to believe that the telephones at this address were being used to conduct an illegal gambling business (Def. App. 167-170).[1] In a supporting affidavit, FBI Agent Orlin Lucksted stated that three confidential informants had related that petitioner Harvey Plotkin, Dominic Serino[2] and others were utilizing the telephones

[1]"Def. App." refers to the consolidated appendix filed by petitioners in the court of appeals. A copy of this appendix is being lodged with this Court.

[2]Serino was tried and convicted with petitioners in this case; however, his conviction was reversed by the court below and his case remanded to the district court for further consideration (see note 3, *infra*).

at the Bickford Avenue residence for illicit gambling purposes (Def. App. 179-183).

In addition, Agent Lucksted's affidavit also described the results of a 1970 court-ordered telephone surveillance directed against a gambling business operated by Anthony St. Laurent. During that surveillance, agents monitored more than 100 gambling related telephone calls, including one on July 27, 1970 between St. Laurent and a man identified as "Humphrey" that was set out in Agent Lucksted's affidavit (Def. App. 185-190). Subsequent FBI surveillance led agents to conclude that "Humphrey" was actually Dominic Serino (*id.* at 190). On December 20, 1974, an order was entered in the District of Massachusetts suppressing the communications intercepted in the surveillance of St. Laurent under *United States* v. *Giordano*, 416 U.S. 505. See *United States* v. *St. Laurent*, 521 F. 2d 506 (C.A. 1).

On the basis of Agent Lucksted's affidavit, the district court authorized the interception of communications over the telephones at the Bickford Avenue residence. The surveillance was carried out between June 3 and June 15, 1971, and all petitioners were overheard. Evidence obtained from this telephone surveillance, together with certain gambling paraphernalia seized at the residence pursuant to a search warrant, was introduced by the government in petitioner's trial for operating an illegal gambling operation in the Revere area.[3]

[3]Because he had been overheard during the illegal St. Laurent monitoring, the court below concluded that co-defendant Serino had standing, and remanded to allow Serino access to the transcripts of his conversations during the St. Laurent monitoring prior to a hearing to test "whether the illegal wiretaps so infected the other evidence set forth in the Lucksted affidavit that no independent basis for finding probable cause existed" (Pet. App. 19).

ARGUMENT

Since the petitioners were neither overheard during the St. Laurent surveillance, nor were targets of it, the court of appeals correctly held that they lack standing to challenge its legality. Petitioners concede (Pet. 6-7) that they are not "aggrieved persons" entitled to seek suppression of electronically intercepted evidence under 18 U.S.C. 2510(11) and 2518(10)(a),[4] and that they do not have standing to invoke the Fourth Amendment's exclusionary rule. Contrary to petitioners' contentions, nothing in 18 U.S.C. 2515[5] confers statutory standing on persons whose communications were not intercepted, and who were not targets of the interception. In defining an "aggrieved person" as anyone "who was a party to any intercepted wire

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[4]18 U.S.C. 2510(11) defines an "aggrieved person" as

> a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed[.]

and 18 U.S.C. 2518(10)(a) further provides in pertinent part that

> [a]ny aggrieved person in any trial, hearing, or proceeding in or before any court * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> * * * * *

[5]18 U.S.C. 2515 provides in pertinent part:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any * * * proceeding in or before any court, * * * if the disclosure of that information would be in violation of this chapter.

or oral communication or a person against whom the interception was directed" (18 U.S.C. 2510(11)), Congress intended to set forth "the class of those who are entitled to invoke the suppression sanction of * * * section 2518 (10)(a) * * *. It is intended to reflect existing law * * *." S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Congress further explained (*id.* at 96):

> [Section 2515's sanction] must, of course, be read in light of section 2518 (10)(a) * * *, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly * * * or indirectly obtained in violation of the chapter. * * * There is, however, no intention to change the attenuation rules. See * * * *Wong Sun* v. *United States*, 83 S. Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law.

In *Alderman* v. *United States*, 394 U.S. 165, 175, this Court recognized that it is within Congress' power to "provide that illegally seized evidence is inadmissible against anyone for any purpose." However, this Court noted (*id.* at 175-176 n. 9):

> Congress has not done so. In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. * * * The Act's legislative history indicates that "aggrieved person," the limiting phrase currently found in Fed.

Rule Crim. Proc. 41(e), should be construed in accordance with existent standing rules.[6]

Given petitioners' concession that they were not "aggrieved" (18 U.S.C. 2518(10)(a)) or the "victim[s] of a search and seizure, one against whom the search was directed" (*Jones* v. *United States*, 362 U.S. 257, 261), they lack standing to contest the legality of the St. Laurent interceptions in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1977.

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[6]Accord, *United States* v. *Scully*, 546 F. 2d 255, 268 (C.A. 9), certiorari denied, April 18, 1977 (No. 76-5918); *United States* v. *Armocida*, 515 F. 2d 29, 35 n. 1 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Bynum*, 513 F. 2d 533, 534-535 (C.A. 2), certiorari denied, 423 U.S. 952; *United States* v. *Scasino*, 513 F. 2d 47 (C.A. 5); *United States* v. *Bellosi*, 501 F. 2d 833, 842 n. 22 (C.A. D.C.); *United States* v. *Gibson*, 500 F. 2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106.